84-1448

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NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

JOSEPH R. LENNON,
Petitioner,

versus

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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March 1985

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QUESTION PRESENTED

When, in a criminal prosecution for interstate transportation of a security taken by fraud, the actual interstate transportation is accomplished by an innocent agent, that interstate transport must, at a minimum, have been reasonably foreseeable by the accused for a violation of 18 U.S.C. section 2314, paragraph one, to occur.

SUBJECT INDEX

	Page
QUESTION PRESENTED	1
THE OPINION BELOW	2
JURISDICTION	2
STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	10
CONCLUSION	18
CERTIFICATE OF SERVICE	18
APPENDIX A—Second Opinion of the Court of Appeals Dated January 11, 1985	A-1
APPENDIX B—Initial Opinion of the Court of Appeals Dated October 31, 1984	B-1

LIST OF AUTHORITIES

CASES

	Page
Glasser v. United States, 315 U.S. 60 (1942)	5
Kann v. U.S., 323 U.S. 88 (1944)	14
McElroy v. U.S., 455 U.S. 642 (1982)	11, 12
Palsgraf v. Long Island R.R., 248 N.Y. 339, 162 N.E. 99 (1928)	15
Rewis v. U.S., 401 U.S. 808 (1971)	13
Ruthenburg v. U.S., 245 U.S. 480 (1918)	13
U.S. v. Berlin, 472 F.2d 13 (9th Cir. 1973)	11, 13
U.S. v. Giles, 300 U.S. 41 (1937)	14
U.S. v. Kelly, 569 F.2d 928 (5th Cir. 1978), *cert. denied*, 439 U.S. 829 (1978)	16, 17
U.S. v. Kenofskey, 243 U.S. 440 (1917)	13
U.S. v. Ludwig, 523 F.2d 705 (8th Cir. 1975), *cert. denied*, 423 U.S. 1076 (1976)	11, 16, 17
U.S. v. Muni, 668 F.2d 87 (2nd Cir. 1981)	15
U.S. v. Sheridan, 329 U.S. 379 (1946)	12, 14, 17

UNITED STATES STATUTES

18 U.S.C. section 2(a)	16, 17
18 U.S.C. section 2(b)	1, 3, 8, 9, 10, 11, 13
18 U.S.C. section 1341	14
18 U.S.C. section 2312	11
18 U.S.C. section 2314	*passim*
28 U.S.C. section 1254(1)	2

RULES OF UNITED STATES SUPREME COURT

Rule 20.1	2
Rule 20.4	2

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Petitioner Joseph R. Lennon respectfully requests that a writ of certiorari issue to review an opinion and judgment of the United States Court of Appeals for the Fifth Circuit, which reversed and remanded Petitioner's conviction of eight (8) counts of an indictment alleging interstate transportation of certain check proceeds obtained by fraud in violation of 18 U.S.C. section 2314 and 18 U.S.C. section 2(b).

THE OPINION BELOW

The initial opinion of the Court of Appeals is not reported and is reproduced as an Appendix to this petition at page B-1. Both Petitioner and the United States of America filed timely petitions for rehearing, and the original opinion of the Court of Appeals was withdrawn and replaced by the opinion reproduced as an Appendix to this petition at page A-1. This opinion is reported in 751 F.2d 737.

JURISDICTION

The opinion and judgment of the Court of Appeals were entered on January 11, 1985. Both the petitioner's and the United States of America's petitions for rehearing were overruled by the Court on January 11, 1985.

Petitioner invokes the Court's certiorari jurisdiction under 28 U.S.C. section 1254(1). Filing of this petition was accomplished within sixty (60) days of the Court of Appeals' opinion, judgment, and order overruling the petitions for rehearing and was therefore timely under Rules 20.1 and 20.4 of this Court.

STATUTORY PROVISIONS INVOLVED

Title 18, United States Code, section 2314, provides in relevant part as follows:

> "Whoever transports in interstate or foreign commerce any goods, wares, merchandise, securities or money of the value of $5,000 or more, knowing the same to have been stolen, converted or taken by fraud . . .
>
> "Shall be fined not more than $10,000 or imprisoned not more than ten years, or both."

Title 18, United States Code, section 2, provides in relevant part as follows:

> "(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal."

STATEMENT OF THE CASE

On January 27, 1983, a Federal grand jury in the Southern District of Texas indicted Petitioner, Joseph R. Lennon, for eight (8) counts of willfully causing the interstate transportation of certain check proceeds obtained by fraud in violation of 18 U.S.C. section 2314 (paragraph 1) and 18 U.S.C. section 2(b). Lennon pled not guilty and was convicted by a jury on all eight counts in the United States District Court for the Southern District of Texas, Houston Division, the Honorable Judge Carl O. Bue, Jr., presiding.[1]

Lennon timely appealed his conviction and sentence to the United States Court of Appeals for the Fifth Circuit. Several issues, including the subject of this Petition for a writ of certiorari, were raised in the appeal. On October 31, 1984, the Fifth Circuit rejected Petitioner's position on the question here presented, but reversed and remanded the case for a new trial because the Trial Court's jury instruction erroneously permitted the jury to convict without finding that the fraudulently-

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1. Judge Bue sentenced Lennon on Count 1 to imprisonment for four years and imposed a consecutive five-year period of probation and a cumulative fine of $70,000 on the remaining counts.

obtained property transported in interstate commerce exceeded $5,000 in value.[2]

Both Lennon and the Government filed Petitions for Rehearing. On January 11, 1985, the Fifth Circuit withdrew and replaced its earlier opinion delivered on October 31, 1985. The new opinion, after reciting the appropriate paragraph of 18 U.S.C. section 2314, again rejected Petitioner's position on the question here presented and again reversed and remanded the case for a new trial on the grounds previously enunciated in the opinion of October 31, 1985. Both Petitions for Rehearing were overruled on that same date.

During 1971 Lennon was employed by Charter International Oil Company, a Texas corporation, as the manager for crude oil purchasing (Tr. 429). Charter International Oil operated a refinery in Houston, and initially Lennon's primary function was to obtain crude oil for the refinery (Tr. 428). In 1974, largely as a result of the Arab oil embrago and the new Federal energy regulations, Charter International became obliged to obtain crude oil from spot market purchases (Tr. 746, 821). Milton Jones, then President of Southwest Petrochem, Inc., a Texas corporation, had found an available supply of crude oil for resale to Charter International (Tr. 29). During the late summer or early fall of 1974, Lennon on behalf of Charter International, met with Jones and agreed to purchase crude oil from Petrochem (Tr. 36). As a con-

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2. In rejecting Petitioner's argument on the question here presented, the Fifth Circuit stated that Lennon was convicted under paragraph 2 of 18 U.S.C. section 2314. In fact, Lennon was convicted under paragraph 1 of 18 U.S.C. section 2314. This oversight was the subject of Lennon's Petition for Rehearing.

dition, Lennon requested that Petrochem pay him personally twenty cents per barrel. Jones agreed (Tr. 36).[3]

On this sale, Petrochem paid a twenty-cent-per-barrel "commission" to H&L Enterprises, a general partnership formed under Texas law between Lennon and his friend and business associate, James Harrigan (Tr. 66). Charter and Petrochem continued to do business and Petrochem continued to pay "commissions" to H&L Enterprises until 1975 when, due to market conditions, the transactions stopped.

Crude oil sales between Petrochem and Charter International resumed in late 1976 (Tr. 68). By this time Dennis Van Mathew negotiated on behalf of Petrochem and H. L. "Buddy" Mayes represented Charter International (Tr. 351; 750). Although there is no evidence of specific discussions between Lennon and Jones after the 1974 meeting, Jones purportedly talked to Lennon about the "commission" payments many times, and it was Jones alone who decided whether a "commission" would be paid and, if so, how much (Tr. 209).[4] Petrochem again paid commissions to H&L and later to Harlen Trading Company, a Texas corporation with shares owned by Lennon and Harrigan, in amounts varying from less than ten cents to twenty cents per barrel (Tr. 75-97).

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3. The evidence at trial concerning this meeting was hotly contested. Mindful, however, of the standard of review under *Glasser v. United States*, 315 U.S. 60 (1942), we will not belabor the Court with the evidentiary dispute on this point.

4. In fact, the commissions paid to H&L and Harlen in the substantive counts of the indictment were ten cents per barrel or less (Exhibits SP 34.1-4; SP 35.1-5; SP 36.1-6; SP 37.1-3; SP 39.1-3; SP 40.1-3; SP 41.1-3; SP 43.1-5).

Each of the sales between Petrochem and Charter was subject to regulations promulgated by the Federal Energy Administration, later the Department of Energy. Thus, if Charter resold the crude oil purchased from Petrochem, Charter's resale price could not exceed its own cost plus its "margin" (that is, the profit that historically had been earned on similar transactions).[5]

Petrochem was likewise subject to FEA regulation, under which it could not pass on any "commission" payments in its sales price to Charter (Tr. 198-200).

During 1978, Charter International formed Charter Crude Oil Company, a wholly-owned subsidiary (Tr. 43). Upon its formation, Charter Crude assumed responsibility for acquiring all of the crude oil for the refinery as well as all crude oil purchased for resale (Tr. 430). Lennon, Mayes, and the rest of their department were transferred to Charter Crude upon its formation, and Lennon was appointed an executive vice-president.

These dealings were highly profitable for both Charter and Petrochem. Charter paid Petrochem less for crude oil than the price it was paying other suppliers (Tr. 753).

The eight sales alleged in the indictment occurred during 1978 and 1979. On each occasion Petrochem hand delivered its invoices from Petrochem's Houston office to Charter's Houston office. Once Charter received the in-

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5. Charter's profit margin was calculated on a monthly accounting period, rather than on individual sales. Thus, during the latter part of any given month, Charter might have been required by the energy regulations to resell crude oil for less than its cost-plus-margin, or even at a loss, in order to comply with federal law. The penalty for non-compliance was a refund of the excess profits to the purchaser. (Tr. 490; 630).

voice, the invoice was reviewed and approved by Lennon's department at Charter. Following approval, each invoice was sent to the Accounting Department, located in a separate building, which issued a check for payment (Tr. 713). Each of the eight checks was drawn on an out-of-state bank, a circumstance neither known, nor reasonably foreseeable, to Lennon.[6]

When each check was prepared, Petrochem picked it up at the Charter offices in Houston (Tr. 723), and hand delivered each check for deposit to Petrochem's Houston bank (Tr. 498).

Upon receipt of each check by Petrochem's bank, a bank officer first called Charter's bank to advise that the check had been received for deposit and would be presented personally for payment. Each check was then sent by special courier to Charter's out-of-state bank and presented for payment (Tr. 499).

After each check was accepted by Charter's bank, the funds were wire transferred to a correspondent bank in Dallas, which bank in turn wired the funds to Petrochem's Houston bank. Once Petrochem's bank received the funds, Petrochem was notified that the funds were available (Tr. 501). In the normal course of business, Charter's out-of-state banks returned the paid checks to the post office box of Charter International or Charter Crude in

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6. The government adopted the legal position both at trial and on appeal that transporting in interstate commerce as used in paragraph one of 18 U.S.C. section 2314 is the "lynchpin" of federal jurisdiction and that knowledge or reasonable foreseeability of the interstate transport is not required. Mayes, who worked in Charter's crude oil purchasing department longer than Lennon, and in fact, replaced Lennon after his resignation, testified he did *not* know whether the Charter checks were drawn on Texas or out-of-state banks (Tr. 724).

Houston. The special handling of each check effected collection in approximately the same time as would have been required between two local Houston banks (Tr. 528).

On each of the eight sales, which were the subject of the indictment, Petrochem issued a "commission" check from its Houston bank payable to either H&L Enterprises of Harlen Trading. Each of these checks was then hand delivered to either Harrigan or Lennon in Houston (Tr. 83-93). Each "commission" check was in turn deposited in a Houston bank account of either H&L Enterprises or Harlen Trading (Exhibits SP 34.2; 35.2; 36.2; 39.2; 40.2; 41.2; 43.4).

Lennon resigned from Charter in June 1979 to work for another company. Lennon never told Charter about the payments to H&L Enterprises or Harlen Trading (Tr. 943). After Lennon left Charter, the volume of sales from Petrochem to Charter Crude increased (Tr. 211).

All of the trial witnesses either were, or had been, Houston residents.

Since Lennon did not personally transport the Charter checks in interstate commerce, the case was submitted to the jury ostensibly under the theory that he "willfully caused" the Charter checks to be transported in interstate commerce. 18 U.S.C. section 2(b) and section 2314, paragraph 1. Over timely defense objection, the Trial Court charged the jury:

> "Now, in a prosecution under section 2314 of Title 18 for transporting in interstate commerce checks which have been taken by fraud, it is not necessary that the defendant know or intend that the checks would be transported in interstate com-

merce so long as he set in motion a series of events which in the normal course resulted in such transportation. Such a normal course of events occurs whenever a check drawn on an out-of-state bank travels across state lines in the process of collection and arrives for payment at the bank on which it is drawn." (Tr. 1073-74).

On appeal Lennon contended *inter alia,* that, at a minimum, sustaining his conviction should legally require either knowledge or reasonable foreseeability of such interstate transportation. The Court of Appeals rejected that contention. In the October 31, 1984, opinion the Court concluded that since 18 U.S.C. section 2314, paragraph 2,[7] contains a "causing" provision, the reference to section 2(b) was mere surplusage, and proof of knowledge or reasonable foreseeability was not required. The Court further rejected Petitioner's argument that "cause" under the mail fraud statute, 18 U.S.C. section 1341, requires knowledge or reasonable foreseeability that the mails will be used; likewise, so should "willfully causing" transport in interstate commerce. The Court of Appeals concluded the purpose of the mail fraud statute is to prevent the use of the mails to facilitate schemes to defraud, while the purpose of section 2314 is aimed at the evils of theft,

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7. 18 U.S.C. section 2314, paragraph two, provides in pertinent part as follows:

"Whoever, having devised or intending to devise any scheme or artifice to defraud or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transports or causes to be transported, or induces any person to travel in, or to be transported in, interstate commerce in the execution or concealment of a scheme or artifice to defraud that person of money or property having a value of $5,000 or more;

"Shall be fined not more than $10,000 or imprisoned not more than ten years or both.

fraud and counterfeiting. Thus the word "cause" requires knowledge or reasonable foreseeability *only* in the mail fraud statute. (emphasis added)

Lennon's Petition for Rehearing pointed out that he was prosecuted under paragraph one, rather than paragraph 2, of section 2314, which does not contain the word "cause."

On January 11, 1985, the Court of Appeals withdrew its October 31, 1984, opinion. The Court again rejected Lennon's argument that "willful causation" requires knowledge or reasonable foreseeability.

Citing paragraph 1 of section 2314, the correct paragraph, the Court of Appeals then concluded that since section 2314[8] contains a "causing" provision similar to section 2(b), the reference to section 2(b) in the indictment was surplusage and the government was not required to prove knowledge or reasonable foreseeability.

Lennon's conviction was reversed and remanded on other grounds.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted because there is a conflict among Circuits. Interstate transportation by an innocent agent of a security taken by fraud requires knowledge or reasonable forseeability by the accused of that interstate transport for a violation of 18 U.S.C. section 2314 to occur. Moreover, the absence of definitive

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8. Section 2314 contains five separate paragraphs, each criminalizing certain conduct. Only paragraph one of section 2314 was involved in this case, and paragraph one does *not* contain the word "cause." Inclusion of section 2(b) was essential to the prosecution's theory.

standards defining when, or if, knowledge or reasonable foreseeability of such transportation in interstate commerce is required presents a recurring problem appropriate for resolution in this case.

In *U.S. v. Berlin,* 472 F.2d 13 (9th Cir. 1973), a *Dyer* Act prosecution,[9] the Ninth Circuit determined that selling a car known to be stolen followed by any subsequent interstate transportation by an innocent purchaser was not a violation of the *Dyer* Act. Although the government contended that such interstate transportation was reasonably foreseeable, the Court held:

> "Since interstate automobile transportation is now commonplace, this construction would seem to render every sale of a stolen car a federal offense. Section 2(b) does, as appellants contend, have overtones of agency, and in our judgment, the willful causation to which it refers must be purposeful rather based simply on reasonable foreseeability."

Contrary to the *Berlin* opinion, the Eighth Circuit in *U.S. v. Ludwig,* 523 F.2d 705 (8th Cir. 1975), *cert. denied,* 423 U.S. 1076 (1976), has determined that a prosecution under section 2314, paragraph one, and section 2(b), does not include the element of reasonable foreseeability. In the *Ludwig* case, two stolen checks drawn on a Missouri bank were deposited by a confederate of the thief in another Missouri bank. Unbeknownst to the accused, or his confederate, the depository bank mailed the stolen checks in its collection process

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9. This Court has recited the legislative history of the Dyer Act (18 U.S.C. section 2312) and the National Stolen Property Act (18 U.S.C. section 2314, paragraph 1) as authority for the interpretation of each statute. This Court has further stated that the purpose of both statutes is the same. *McElroy v. U.S., infra.*

to a correspondent bank in Illinois. In affirming a conviction under paragraph one of section 2314, the Eighth Circuit concluded that the government should not have to prove that the interstate transport was in any way reasonably foreseeable.

This Court has impliedly recognized the conflict among Circuits regarding what proof is necessary to sustain a conviction for interstate transportation, when that interstate transportation is effected by an innocent agent. In *McElroy v. U.S.*, 455 U.S. 642 (1982) at p. 653, ftnt. 16, this Court noted:

> "Some Circuits have even indicated that the statutory phrase 'interstate commerce' is coextensive with congressional authority under the commerce clause . . ."

This Court has never adopted that proposition, nor should it do so now. Petitioner does not argue that Congress lacked the authority to pass a statute of such sweeping dimensions, but rather, that it has not done so in section 2314.

This Court has also observed the congressional policies for a federal criminal statute, such as section 2314 and specifically the reasons for its passage. In *U.S. v. Sheridan*, 329 U.S. 379 (1946), this Court noted that congress contemplated coming to the aid of the states in deterring and punishing criminals who utilize interstate commerce to make a successful getaway. *McElroy v. U.S., supra*, pointed out that federal authority might be necessary to fully investigate the offense and compel witnesses from other states to testify. None of those circumstances are present in this case. The witnesses and

documents were all local. The happenstance of Charter banking out-of-state did not allow Petitioner to utilize interstate commerce to make a getaway. None of the policies requiring federal intervention are present in this case. Obviously, the lack of these circumstances, standing alone, does not preclude proscription of our facts from section 2314, paragraph one and section 2(b). Such absence does, however, demonstrate the need for a rational doctrine to restrict the application of section 2314. See, e.g., *Rewis v. U.S.*, 401 U.S. 808 (1971), (holding that the Travel Act, in conjunction with section 2(b), which prohibits willfully causing interstate travel to promote an unlawful activity, requires more than a showing of reasonable foreseeability by the manager of a gambling facility that he will be patronized by out-of-state customers).

As the Court further noted in the *Rewis* case, an expansive Travel Act would have been recognized by Congress to over extend limited federal police resources.

18 U.S.C. section 2314, paragraph 1 and section 2(b), as they apply to this case, provide:

> "Whover (willfully causes to be transported) in interstate . . . commerce any . . . securities . . . of the value of $5,000 or more, knowing the same to have been . . . taken by fraud . . . (s)hall be fined not more than $10,000 or imprisoned not more than ten years, or both."

Although *U.S. v. Berlin, supra,* required "willful causation" to be purposeful, the concept of causation has been addressed on may occasions in interpreting the mail and wire fraud statutes. *U.S. v. Kenofskey,* 243 U.S. 440 (1917); *Ruthenburg v. U.S.*, 245 U.S. 480 (1918);

and *U.S. v. Giles,* 300 U.S. 41 (1937). All dealt with the concept of causation and have interpreted conduct from which the use of the mails was reasonably foreseeable to have "caused" the mails to be used as required in the mail fraud statute (18 U.S.C. section 1341). Similarly, in *Kann v. U.S.,* 323 U.S. 88 (1944), this Court again reiterated in the context of a federal mail fraud prosecution that

> "While there may be some question as to whether the defendants may be said to have "caused" the mailing of the checks, we think it a fair inference that these defendants who drew, or those who cashed, the checks believed that the banks which took them would mail them to the banks on which they were drawn, and assuming the Petitioner participated in the scheme, their knowledge was his knowledge."

The Court of Appeals' opinion rejected the mail or wire fraud case definitions of "causation" cited by Petitioner and concluded that since the purpose of section 2314 was to prevent fraud and not to regulate interstate commerce, and since the purpose of the mail fraud statute was to prevent use of the mails in furtherance of fraudulent schemes, only that "cause" used in the mail fraud statute requires the element of reasonable foreseeability. Petitioner fails to appreciate how a different legislative intent can change the meaning of the word "cause," nor does it follow that "willfully causing" requires a lesser scienter than "causing."

In *U.S. v. Sheridan, supra,* the defendant was charged under section 2314 with transportation in interstate commerce of forged checks. Each of the checks, drawn on a nonexistent Missouri bank account, was cashed or de-

posited in Michigan banks, who in turn sent the checks to Missouri for acceptance. In concluding that Sheridan caused the interstate trannsportation, this Court stated:

> "Certainly he knew the checks would have to be sent to the Missouri bank for collection. Given the proven forgery and uttering, no other conclusion would be possible. Necessarily, too, it would follow he intended the paying bank to send the checks there for that purpose. He knew they must cross state lines to be presented. One who induces another to do exactly what he intends, and does so by defrauding him, hardly can be held not to cause what is done." . . . 329 U.S. at 391.

This doctrine of foreseeability is perhaps best enunciated in the civil tort doctrine of proximate cause enunciated by Justice Benjamine Cardoza in *Palsgraf v. Long Island R.R.*, 248 N.Y. 339, 162 N.E. 99 (1928). The criminal concept of causation, and the rationale of knowledge or reasonable foreseeability has been well articulated in *U.S. v. Muni*, 668 F.2d 87, 89-90 (2nd Cir. 1981):

> "When a person is to be held civilly or criminally responsible for causing an act, a mechanical chain of events test, applying 'but for' reason would unduly expand the scope of consequences for which he would be responsible. Both the criminal and the civil law have circumscribed the range of consequences by considering an act to have been caused not simply when it was a physical consequence of the person's conduct but when, in addition, the actor either knew the consequences would occur or its occurrence was reasonably foreseeable. By invoking an objective test of reasonable foreseeability, the law avoids both a premium on ignorance and a vast range of liability for remote and unlikely physical consequences." (footnotes omitted)

As is readily apparent from the Trial Court's charge in this case, a simple "but for" test was applied to the interstate element of Petitioner's charge. Paradoxically, willfully causing transportation in interstate commerce under this "but for" reasoning imposes criminal liability without knowledge or reasonable foreseeability of the interstate transport. The civil tort concept of duty requires reasonable foreseeability before imposing *civil* liability. It follows that we may impose a dollar judgment against a defendant only after finding that the injury imposed by his conduct was reasonably foreseeable. We may, however, extract years of his life under federal criminal liability if a simple "but for" test is met.

U.S. v. Ludwig, supra, imposes criminal liability under a mechanical "but for" test and should be overruled.

As an additional grounds for rejecting the argument of Petitioner's that a prosecution such as this one should minimally require reasonable foreseeability of the interstate transport, the Court of Appeals relied on *U.S. v. Kelly,* 569 F.2d 928, 934 (5th Cir. 1978), *cert. denied,* 439 U.S. 829 (1978). Kelly was, in fact, a prosecution for interstate transport under section 2(a).[10]

In the *Kelly* case, Kelly's confederates, unknown to him, transported stolen property across state lines. The Fifth Circuit rejected Kelly's argument that interstate transportation under such circumstances required knowledge or reasonable foreseeability by the accused. Such a rule has deep roots in the common law, and is to be distinguished from Petitioner's case, where the interstate

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10. 18 U.S.C. section 2(a) provides: "Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal."

transport was accomplished by an innocent agent. In the *Kelly* case, the interstate transport was accomplished by a *member* of the criminal enterprise. The common law felony murder rule is exemplary of a section 2(a) violation.

Article 2314 hangs precariously close to the abyss of becoming a *general* criminal statute proscribing stealing, converting, or taking by fraud *any* goods, wares, merchandise, securities or money having a value of $5,000 or more.

The practical effect of failing to require at least reasonable foreseeability in cases where the interstate transport is accomplished by an innocent agent, coupled with this Court's interpretation of interstate commerce as encompassing more than travel across state lines, as enunciated in *U.S. v. Sheridan, supra,* abrogates the element of transporting in interstate or foreign commerce from section 2314. This clearly was not the intent of Congress. This Court is respectfully requested to reject the reasoning in *U.S. v. Ludwig, supra,* and provide a minimal standard of reasonable foreseeability when the transport in interstate commerce is accomplished by an innocent agent.

This case was a case of first impression for the Fifth Circuit regarding the question presented; although not recognized as such. In view of the conflict among Circuits, and further in view of the extension of the National Stolen Property Act far beyond the application intended by Congress, it is requested that the decision below should be reviewed by this Court.

CONCLUSION

For all of the foregoing reasons, Petitioner, Joseph R. Lennon, respectfully suggests that his Petition for the Writ of Certiorari should be granted.

Respectfully submitted,

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Counsel for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Petition for Writ of Certiorari has been served upon the Solicitor General, Department of Justice, Washington, D.C. 20530, in accordance with Rule 28, Title 28, U.S.C.A., the same having been mailed, first class mail, on the 12th day of March, 1985.

OLNEY G. WALLIS

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 83-2713

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

JOSEPH R. LENNON,
Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas

(January 11, 1985)

Before RUBIN, REAVLEY and TATE, Circuit Judges.

REAVLEY, Circuit Judge:

The opinion delivered on October 31, 1984 is withdrawn and is replaced by the following.

Joseph Lennon was convicted by a jury of eight counts of causing the interstate transportation of certain check

proceeds obtained by fraud in violation of 18 U.S.C. §§ 2, 2314 (1982). We reverse and remand.

Lennon was employed by Charter International Oil Company and Charter Crude Oil Company, Texas corporations and subsidiaries of Charter Oil Company, Inc., a Florida corporation, to supply Charter's oil refinery in Houston approximately 70,000 barrels of crude oil per day. To meet part of this demand, Lennon agreed on behalf of Charter to purchase crude oil from Southwest Petrochem, Inc. in late summer or early fall of 1974. As a condition to making the contract, Lennon demanded that Petrochem pay him, personally, twenty cents for each barrel he purchased for Charter. Charter neither was apprised of nor consented to the kickback arrangement.

These dealings proved to be profitable to all parties for a number of years. Charter received a large portion of its needed crude oil at a cost below the average it was paying other suppliers. Petrochem had a steady buyer that accounted for the vast majority of its revenues. Pursuant to the kickback agreement, Lennon received from Petrochem numerous checks that totaled approximately $1,193,000. The last kickback payment was made in March 1979, and Lennon shortly thereafter resigned from Charter. After Lennon's departure from Charter, Petrochem continued to sell crude oil to Charter but never made any more kickback payments to Lennon or anyone at Charter.

Charter initiated each sale of crude oil by a prepayment to Petrochem. Charter's checks were drawn on various banks located in Florida, Massachusetts, and Illinois. Petrochem deposited the checks in a Houston bank, which sent the checks directly to the out-of-state

bank for collection. Petrochem then used those funds to purchase the crude oil from its supplier and to pay Lennon the kickback.

Petrochem paid Lennon the kickbacks by checks made to H & L Enterprises, a general partnership formed under Texas law between Lennon and his friend and business associate James Harrigan; to Harlen Trading Company, Inc., a Texas corporation with shares owned by Lennon and Harrigan; and to LATCO, an assumed business name of Lennon. The kickback checks were all drawn upon and deposited in Texas banks.

Lennon presented evidence through the testimony of Harrigan that the moneys paid to H & L, Harlen, and LATCO were not kickbacks to Lennon. According to Harrigan's testimony, the money was paid to Harrigan through Harlen, H & L, and LATCO as a commission for his own services to Petrochem.

An additional factor to be considered is the regulation of the oil industry during the 1970's and early 1980's by the federal government. Under these regulations, the price of crude oil and certain refined oil products were regulated on a cost-plus margin basis. The margin was set on a unit basis but was averaged monthly with no carryover. In other words, a reseller of crude oil or a refiner of regulated products could charge purchasers only an amount equal to its cost, expenses, and a certain margin for profit. Although the profit might vary from barrel to barrel, the average margin during a given month could not exceed a certain amount. If the maximum average margin was not obtained in a particular month, the unrealized profit was lost and could not be recaptured by exceeding the set margin in the next month.

In this case all of Petrochem's crude oil sales were subject to the price regulations. Approximately sixty to seventy percent of each barrel of crude oil Charter purchased was refined into unregulated products. As to the crude oil it resold, Charter did not obtain the maximum profits allowed by the regulations during any month from May 1978 to March 1979, when the violations by Lennon affected Charter's profits.

The grand jury returned an indictment charging Lennon with eight counts of violating 18 U.S.C. §§ 2, 2314 (1982). Specifically, the indictment charged Lennon with causing eight checks issued in 1978 and 1979 by Charter payable to Petrochem to be transported in interstate commerce and knowing that certain proceeds of the checks were taken by fraud. The indictment listed the eight checks by date, amount, check number, and place of origin, and it charged that Lennon's purpose was to obtain money in excess of $5,000. At trial, the United States presented evidence of the exact amount of the kickback included in each of the eight checks, which varied from a low of $12,234.50 to a high of $27,373.00.

The issues on appeal are: one, whether the applicable statutory provisions, 18 U.S.C. §§ 2(b), 2314 (1982), require knowledge or reasonable foreseeability that money obtained by fraud will be transported in interstate commerce; two, whether the trial court improperly instructed the jury on "causing" under section 2314; three, whether the trial court improperly instructed the jury on fraud under section 2314; four, whether there was sufficient evidence to support a finding of fraud; five, whether, for section 2314 to apply, all the property transported in interstate commerce must have been obtained by fraud; six, whether the indictment was defective for failing to

allege that certain proceeds exceeded $5,000 as required by section 2314; and seven, whether the trial court's jury instruction on the elements of section 2314 was improper.

1. *Knowledge or Reasonable Foreseeability*

Section 2314, the so-called National Stolen Property Act under which Lennon was convicted, provides in part:

> Whoever transports in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of $5,000 or more, knowing the same to have been stolen, converted or taken by fraud . . .
>
> . . .
>
> Shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

18 U.S.C. § 2314 (1982). Numerous circuits have held that section 2314 does not require knowledge or reasonable foreseeability of interstate transport of the money obtained by fraud. *United States v. Strauss,* 443 F.2d 986, 988 (1st Cir.), *cert. denied,* 404 U.S. 851, 92 S.Ct. 87, 30 L.Ed.2d 90 (1971); *United States v. Mingoia,* 424 F.2d 710, 713 (2d Cir. 1970); *United States v. White,* 451 F.2d 559 (6th Cir. 1971); *United States v. Ludwig,* 523 F.2d 705, 706-08 (8th Cir. 1975), *cert. denied,* 423 U.S. 1076, 96 S.Ct. 861, 47 L.Ed.2d 86 (1976); *United States v. Masters,* 456 F.2d 1060, 1061 (9th Cir. 1972). Furthermore, this circuit has held that knowledge or reasonable foreseeability of interstate transport is not required to convict under another paragraph of section 2314, which contains similar interstate transport wording as the paragraph under which Lennon was convicted. *United States v. Kelly,* 569 F.2d 928, 934

(5th Cir.), *cert. denied,* 439 U.S. 829, 99 S.Ct. 105, 58 L.Ed.2d 123 (1978). Lennon has cited no new authority or reason that has not previously been considered and rejected why this court should not follow other circuits and *Kelly.*

Lennon argues further that knowledge or reasonable foreseeability of interstate transport is required when the indictment and charge include, as here, the substance of 18 U.S.C. § 2(b) (1982). Section 2(b) provides:

> Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

Section 2(b) applies generally to all federal criminal statutes and prohibits one from causing another to do any act that would be illegal if one did it personally. *See, e.g., United States v. Gleason,* 616 F.2d 2, 20 (2d Cir. 1979), *cert. denied,* 444 U.S. 1082, 100 S.Ct. 1037, 62 L.Ed.2d 767 (1980). Section 2314, however, also contains a "causing" provision similar to section 2(b) which specifically prohibits one from causing another to transport money obtained by fraud in interstate commerce. *See, e.g., United States v. Ludwig,* 523 F.2d 705, 706 & n.2 (8th Cir. 1975), *cert. denied,* 423 U.S. 1076, 96 S.Ct. 861, 47 L.Ed.2d 86 (1976). Although we do not accept the government's contention that the "causing" under section 2(b) reaches activity not within the "causing" of section 2314, neither do we agree with Lennon's contention that by reference to section 2(b) in the indictment, the government shouldered a burden of proving knowledge or reasonable foreseeability of interstate transport. If there is a difference, it has no bearing on this

case and the reference to "causing" in section 2(b) is mere surplusage to be ignored. *See United States v. Lyons,* 706 F.2d 321, 324 & n.1 (D.C. Cir. 1983).

A final basis for Lennon's argument is that "cause" under the mail fraud statute, 18 U.S.C. § 1341 (1982), requires knowledge or reasonable foreseeability that the mails will be used in commission of the fraud, and that therefore "cause" under section 2314 should as well. Lennon overlooks, however, the different purposes underlying the statutes. "[S]ection 2314 is aimed at the evils of theft, fraud, and counterfeiting and not at the regulation of interstate transportation. Suppression of movement of the fruits of theft and fraud is only the means to the end of suppressing theft and fraud themselves." *United States v. Roselli,* 432 F.2d 879, 891 (9th Cir. 1970), *cert. denied,* 401 U.S. 924, 91 S.Ct. 883, 27 L.Ed.2d 828 (1971). On the other hand, the purpose of the mail fraud statute is to prevent the use of the mails to facilitate schemes to defraud. *Parr v. United States,* 363 U.S. 370, 389, 80 S.Ct. 1171, 1182, 4 L.Ed.2d 1277 (1960). Because interstate commerce is a means to an end for section 2314 and prohibiting unlawful use of the mails is the end of the mail fraud statute, it is perfectly reasonable that only the mail fraud statute requires knowledge or reasonable foreseeability.

2. *Jury Instruction on Causing*

Lennon contends that the trial court committed reversible error by instructing the jury:

> Now, in a prosecution under Section 2314 of Title 18 for transporting in interstate commerce checks which have been taken by fraud, it is not necessary that the defendant know or intend that the

> checks would be transported in interstate commerce so long as he set in motion a series of events which in the normal course resulted in such transportation. Such a normal course of events occurs whenever a check drawn on an out-of-state bank travels across state lines in the process of collection and arrives for payment at the bank on which it is drawn.

Lennon first urges that the instruction was incorrect because it directed a verdict on the element of causing the checks to be transported in interstate commerce. For example, in *United States v. Johnson,* 718 F.2d 1317 (5th Cir. 1983), the court held that the trial court erred by instructing the jury that a particular document was a security, an essential element of the crime. In this case, however, the challenged instruction never addressed the checks at issue. Rather, the trial correctly explained to the jury the meaning of "cause" in section 2314 as announced in *Pereira v. United States,* 347 U.S. 1, 8-10, 74 S.Ct. 358, 363, 98 L.Ed. 435 (1954).[1]

3. *Jury Instructions on Fraud*

Lennon argues that the jury instructions regarding fraud were incorrect. The trial court charged:

> In order to find that the checks listed in the indictment were "taken by fraud" within the meaning of the statute you must find that the defendant knowingly and willfully and with specific intent participated in a scheme to defraud his employer, Charter.

---

1. Assuming that the instruction was a correct statement of the law, Lennon next argues the instruction was improper because it failed to require the jury to find that Lennon knew or reasonably foresaw that the money obtained by fraud would be transported in interstate commerce. This argument, however, has already been rejected.

> You can find this to be the case only if you find:
>
> (1) that the defendant benefited in his own right from business transactions that he caused his employer to engage in;
>
> (2) that the defendant had a duty to disclose material information to his employer;
>
> (3) that the defendant failed to disclose this information to his employer; and
>
> (4) that the defendant's failure to disclose this information to his employer caused some detriment to his employer to the extent that, had it been known, the information would have likely caused the employer to alter its business practice.
>
> Information is "material" whenever an employee has reason to believe the information would lead a reasonable employer to change its business conduct.

This instruction was based on *United States v. Ballard*, 663 F.2d 534 (5th Cir. 1981). Although *Ballard* was a mail fraud prosecution, the instruction was not limited to the particular means of the fraud or directed to the peculiarity of a particular crime. The instruction was correct.

4. *Sufficiency of Evidence on Fraud*

Lennon argues that there was no evidence to establish that Charter was defrauded as required by section 2314. The government presented evidence from which the jury could have concluded that Lennon defrauded Charter of money. First, Lennon extracted ten to twenty cents per barrel from Petrochem that could, and should, have benefited Charter by decreasing the cost of the crude oil. Second, lower costs would have increased profits. Third, the price control regulations would not have prevented

this increase in its profits, because most of Charter's refined products were not regulated and, on the regulated products, Charter was never able to obtain the monthly average maximum per barrel profit.

Lennon next argues that there was no evidence of fraud, because the government never presented evidence that Charter suffered detriment in the amount of $5,000 or more for each count. Section 2314, however, requires proof only that the property taken by fraud and transported in interstate commerce have a value of $5,000 or more, 18 U.S.C. § 2314 (1982); *United States v. Freeman,* 619 F.2d 1112, 1118 (5th Cir. 1980), *cert. denied,* 450 U.S. 910, 101 S.Ct. 1348, 67 L.Ed.2d 334 (1981), and that the defrauded party suffer some tangible detriment of value, *United States v. Smith,* 686 F.2d 234, 239-40 (5th Cir. 1982). Section 2314 does not require the defrauded party to suffer detriment in the amount of $5,000 or more.[2] The government carried its burden by presenting evidence from which the jury could have found that Charter did suffer *some* indeterminate detriment for each kickback check and that the kickback payments to Lennon exceeded $5,000.

5. *Transportation of the Fraudulently Obtained Property*

Another issue raised by this case is whether section 2314 requires that all the property transported in interstate commerce be taken by fraud or merely that, of the

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2. Ordinarily, the amount of the detriment suffered by the defrauded party will in fact be equal to the value of the transported property. Here, however, because it is impossible to prove what Charter would have done had it known of the kickback scheme, the amount of Charter's detriment is not necessarily the amount of the kickback transported in interstate commerce.

transported property, at least $5,000 be obtained by fraud.

Here, the government presented evidence establishing that sums in the millions of dollars were transported in interstate commerce only part of which was obtained by fraud. For section 2314 to apply, property transported in interstate commerce having a value of $5,000 must have been obtained by fraud; this does not mean that all the property transported in interstate commerce have been obtained by fraud. *See* 18 U.S.C. § 2314 (1982); *United States v. Freeman,* 619 F.2d 1112, 1118 (5th Cir. 1980), *cert. denied,* 450 U.S. 910, 101 S.Ct. 1348, 67 L.Ed.2d 334 (1981). Therefore, the government met its burden.

6. *Defective Indictment*

Lennon urges that the indictment was defective, because it alleged that "certain proceeds" were taken by fraud and did not allege that the proceeds exceeded $5,000 as required by section 2314. An indictment is sufficient if "it, first, contains the elements of the offense charged and fairly informs a defendant of the charge against which he must defend, and, second, enables him to plead an acquittal or conviction in bar of future prosecutions for the same offense." *Hamling v. United States,* 418 U.S. 87, 117, 94 S.Ct. 2887, 2907, 41 L.Ed.2d 590 (1974). Furthermore, an indictment's validity is ascertained from a reading of it as a whole and is determined by practical, not technical considerations. *United States v. Willis,* 583 F.2d 203, 207 (5th Cir. 1978).

Here, the indictment is sufficient under the above standard. First, each count of the indictment alleges that

Lennon's purpose was to defraud Charter of money in excess of $5,000 and that "certain proceeds" were taken by fraud. If read as a whole and in a practical manner, the indictment alleged all the elements of the crime and fairly apprised Lennon of the charge against him.

7. *Jury Instruction on Elements of Section 2314*

The jury instruction on the elements of section 2314 stated:

> Therefore, there are three essential elements which must be proved beyond a reasonable doubt in order to establish the offense proscribed by the law as applicable to this case:
>
> First: that the defendant willfully transported or caused to be transported, in interstate commerce, checks as described in the indictment;
>
> Second: that such checks had a value in excess of $5,000; and
>
> Third: that at the time of the transportation the defendant knew the checks were obtained or taken by fraud.

Lennon contends that the indictment materially differed from the trial court's instructions to the jury and that the instructions permitted the jury to convict upon findings shy of what section 2314 requires. Because we agree with Lennon on the latter contention, we need not discuss the former one.

Lennon objected to the instruction on the elements of section 2314 at trial, arguing that the instruction given would allow the jury to convict if it found merely that the checks from Charter to Petrochem exceeded $5,000.

Lennon specifically requested that the jury instructions include words to the effect that the portion of such checks taken by fraud must have exceeded $5,000. The government disagreed and insisted that the instruction was correct. According to the government, the whole check from Charter to Petrochem was obtained by fraud, because embedded in those checks were kickbacks obtained by fraud. Furthermore, the government argued that there was no problem with the instruction factually, because all of the kickbacks exceeded $5,000. We disagree with the government.

Under the above instruction, the jury could have convicted Lennon by finding that the checks from Charter to Petrochem exceeded $5,000 and that any part of the checks was obtained by fraud. This is significant because of the defendant's evidence that Harrigan arranged the payments and that lesser amounts, if any, were taken by Lennon. The jury could have found that the checks from Charter to Petrochem exceeded $5,000, that most of the moneys that the government characterized as kickbacks were actually proper commissions paid to Harrigan, and that some amount out of each larger check, possibly less than $5,000, was obtained by fraud.

Section 2314 clearly requires that the fraudulently obtained property transported in interstate commerce exceed $5,000. 18 U.S.C. § 2319 (1982); *United States v. Freeman,* 619 F.2d 1112, 1118 (5th Cir. 1980), *cert. denied,* 450 U.S. 910, 101 S.Ct. 1348, 67 L.Ed.2d 334 (1981). The jury instruction erroneously permitted the jury to find that Lennon violated section 2314 by causing fraudulently obtained property having a value of less than $5,000.

Lennon's conviction is REVERSED. The cause is remanded. The petitions for rehearing are overruled. Mandate shall issue forthwith.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 83-2713

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

JOSEPH R. LENNON,
Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas

(October 31, 1984)

Before RUBIN, REAVLEY and TATE, Circuit Judges.

REAVLEY, Circuit Judge:

Joseph Lennon was convicted by a jury of eight counts of causing the interstate transportation of certain check proceeds obtained by fraud in violation of 18 U.S.C. §§ 2, 2314 (1982). We reverse and remand.

Lennon was employed by Charter International Oil Company and Charter Crude Oil Company, Texas corporations and subsidiaries of Charter Oil Company, Inc., a Florida corporation, to supply Charter's oil refinery in Houston approximately 70,000 barrels of crude oil per day. To meet part of this demand, Lennon agreed on behalf of Charter to purchase crude oil from Southwest Petrochem, Inc., in late summer or early fall of 1974. As a condition to making the contract, Lennon demanded that Petrochem pay him, personally, twenty cents for each barrel he purchased for Charter. Charter neither was apprised of nor consented to the kickback arrangement.

These dealings proved to be profitable to all parties for a number of years. Charter received a large portion of its needed crude oil at a cost a little below the average it was paying other suppliers. Petrochem had a steady buyer that accounted for the vast majority of its revenues. Pursuant to the kickback agreement, Lennon received from Petrochem numerous checks that totaled approximately $1,193,000. The last kickback payment was made in March 1979, and Lennon shortly thereafter resigned from Charter. After Lennon's departure from Charter, Petrochem continued to sell crude oil to Charter but never made any more kickback payments to Lennon or anyone at Charter.

Charter initiated each sale of crude oil by a prepayment to Petrochem. Charter's checks were drawn on various banks located in Florida, Massachusetts, and Illinois. Petrochem deposited the checks in a Houston bank, which sent the checks directly to the out-of-state bank for collection. Petrochem then used those funds to purchase the crude oil from its supplier and to pay Lennon the kickback.

Petrochem paid Lennon the kickbacks by checks made to H & L Enterprises, a general partnership formed under Texas law between Lennon and his friend and business associate James Harrigan; to Harlen Trading Company, Inc., a Texas corporation with shares owned by Lennon and Harrigan; and to LATCO, an assumed business name of Lennon. The kickback checks were all drawn upon and deposited in Texas banks.

Lennon presented evidence through the testimony of Harrigan that the moneys paid to H & L, Harlen, and LATCO were not kickbacks to Lennon. According to Harrigan's testimony, the money was paid to Harrigan through Harlen, H & L, and LATCO as a commission for his own services to Petrochem.

An additional factor to be considered is the regulation of the oil industry during the 1970's and early 1980's by the federal government. Under these regulations, the price of crude oil and certain refined oil products were regulated on a cost-plus margin basis. The margin was set on a unit basis but was averaged monthly with no carryover. In other words, a reseller of crude oil or a refiner of regulated products could charge purchasers only an amount equal to its cost, expenses, and a certain margin for profit. Although the profit might vary from barrel to barrel, the average margin during a given month could not exceed a certain amount. If the maximum average margin was not obtained in a particular month, the unrealized profit was lost and could not be recaptured by exceeding the set margin in the next month.

In this case all of Petrochem's crude oil sales were subject to the price regulations. Approximately sixty to seventy percent of each barrel of crude oil Charter pur-

chased was refined into unregulated products. As to the crude oil it resold, Charter did not obtain the maximum profits allowed by the regulations during any month from May 1978 to March 1979, when the violations by Lennon affected Charter's profits.

The grand jury returned an indictment charging Lennon with eight counts of violating 18 U.S.C. §§ 2, 2314 (1982). Specifically, the indictment charged Lennon with causing eight checks issued in 1978 and 1979 by Charter payable to Petrochem to be transported in interstate commerce and knowing that certain proceeds of the checks were taken by fraud. The indictment listed the eight checks by date, amount, check number, and place of origin, and it charged that Lennon's purpose was to obtain money in excess of $5,000. At trial, the United States presented evidence of the exact amount of the kickback included in each of the eight checks, which varied from a low of $12,234.50 to a high of $27,373.00.

The issues on appeal are: one, whether the applicable statutory provisions, 18 U.S.C. §§ 2(b), 2314 (1982), require knowledge or reasonable foreseeability that money obtained by fraud will be transported in interstate commerce; two, whether the trial court improperly instructed the jury on "causing" under section 2314; three, whether the trial court improperly instructed the jury on fraud under section 2314; four, whether there was sufficient evidence to support a finding of fraud; five, whether, for section 2314 to apply, all the property transported in interstate commerce must have been obtained by fraud; six, whether the indictment was defective for failing to allege that certain proceeds exceeded $5,000 as required by section 2314; and seven, whether the trial court's jury instruction on the elements of section 2314 was improper.

1. *Knowledge or Reasonable Foreseeability*

Section 2314, the so-called National Stolen Property Act under which Lennon was convicted, provides in part:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transports or causes to be transported, or induces any person to travel in, or to be transported in interstate commerce in the execution or concealment of a scheme or artifice to defraud that person of money or property having a value of $5,000 or more . . .
>
> . . .
>
> Shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

18 U.S.C. § 2314 (1982). This court has held that section 2314 does not require knowledge or reasonable foreseeability of interstate transport of the money obtained by fraud. *United States v. Kelly*, 569 F.2d 928, 934 (5th Cir.), *cert. denied*, 439 U.S. 829, 99 S.Ct. 105, 58 L.Ed.2d 123 (1978). Lennon has cited no new authority or reason why *Kelly* should be overruled that has not previously been considered and rejected.

Lennon argues further that knowledge or reasonable foreseeability of interstate transport is required when the indictment and charge include, as here, the substance of 18 U.S.C. § 2(b) (1982). Section 2(b) provides:

> Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

Section 2(b) applies generally to all federal criminal statutes and prohibits one from causing another to do any act that would be illegal if one did it personally. *See, e.g., United States v. Gleason,* 616 F.2d 2, 20 (2d Cir. 1979), *cert. denied,* 444 U.S. 1082, 100 S.Ct. 1037, 62 L.Ed.2d 767 (1980). Section 2314, however, also contains a "causing" provision similar to section 2(b) which specifically prohibits one from causing another to transport money obtained by fraud in interstate commerce. *See, e.g., United States v. Ludwig,* 523 F.2d 705, 706 (8th Cir. 1975), *cert. denied,* 423 U.S. 1076, 96 S.Ct. 861, 47 L.Ed.2d 86 (1976). Although we do not accept the government's contention that the "causing" under section 2(b) reaches activity not within the "causing" of section 2314, neither do we agree with Lennon's contention that by reference to section 2(b) in the indictment, the government shouldered a burden of proving knowledge or reasonable foreseeability of interstate transport. If there is a difference, it has no bearing on this case and the reference to "causing" in section 2(b) is mere surplusage to be ignored. *See United States v. Lyons,* 706 F.2d 321, 324 & n.1 (D.C. Cir. 1983).

A final basis for Lennon's argument is that "cause" under the mail fraud statute, 18 U.S.C. § 2341 (1982), requires knowledge or reasonable foreseeability that the mails will be used in commission of the fraud, and that therefore, "cause" under section 2314 should as well. Lennon overlooks, however, the different purposes underlying the statutes. "[S]ection 2314 is aimed at the evils of theft, fraud, and counterfeiting and not at the regulation of interstate transportation. Suppression of movement of the fruits of theft and fraud is only the means to the end of suppressing theft and fraud themselves." *United*

States v. Roselli, 432 F.2d 879, 891 (9th Cir. 1970), *cert. denied,* 401 U.S. 924, 91 S.Ct. 924, 27 L.Ed.2d 828 (1971). On the other hand, the purpose of the mail fraud statute is to prevent the use of the mails to facilitate schemes to defraud. *Parr v. United States,* 363 U.S. 370, 389, 80 S.Ct. 1171, 1182, 4 L.Ed.2d 1277 (1969). Because interstate commerce is a means to an end for section 2314 and prohibiting unlawful use of the mails is the end of the mail fraud statute, it is perfectly reasonable that only the mail fraud statute requires knowledge or reasonable foreseeability.

2. *Jury Instruction on Causing*

Lennon contends that the trial court committed reversible error by instructing the jury that:

> Now, in a prosecution under Section 2314 of Title 18 for transporting in interstate commerce checks which have been taken by fraud, it is not necessary that the defendant know or intend that the checks would be transported in interstate commerce so long as he set in motion a series of events which in the normal course resulted in such transportation. Such a normal course of events occurs whenever a check drawn on an out-of-state bank travels across state lines in the process of collection and arrives for payment at the bank on which it is drawn.

Lennon first urges that the instruction was incorrect because the instruction directed a verdict on the element of causing the checks to be transported in interstate commerce. For example, in *United States v. Johnson,* 718 F.2d 1317 (5th Cir. 1983), the court held that the trial court erred by instructing the jury that a particular document was a security, an essential element of the crime.

In this case, however, the challenged instruction never addressed the checks at issue. Rather, the trial correctly explained to the jury the meaning of "cause" in section 2314 as announced in *Pereira v. United States,* 347 U.S. 1, 8-10, 74 S.Ct. 358, 363, 98 L.Ed.2d 435 (1954).[1]

3. *Jury Instructions on Fraud*

Lennon argues that the jury instructions regarding fraud were incorrect. The trial court charged:

> In order to find that the checks listed in the indictment were "taken by fraud" within the meaning of the statute you must find that the defendant knowingly and willfully and with specific intent participated in a scheme to defraud his employer, Charter.
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> You can find this to be the case only if you find:
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> (1) that the defendant benefited in his own right from business transactions that he caused his employer to engage in;
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> (2) that the defendant had a duty to disclose material information to his employer;
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> (3) that the defendant failed to disclose this information to his employer; and
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> (4) that the defendant's failure to disclose this information to his employer caused some detriment to his employer to the extent that, had it been known, the information would have likely caused the employer to alter its business practice.

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1. Assuming that the instruction was a correct statement of the law, Lennon next argues the instruction was improper because it failed to require the jury to find that Lennon knew or reasonably foresaw that the money obtained by fraud would be transported in interstate commerce. This argument, however, has already been rejected.

> Information is "material" whenever an employee has reason to believe the information would lead a reasonable employer to change its business conduct.

This instruction was based on *United States v. Ballard*, 663 F.2d 534 (5th Cir. 1981). Although *Ballard* was a mail fraud prosecution, the instruction was not limited to the particular means of the fraud or directed to the peculiarity of a particular crime. The instruction was correct.

4. *Sufficiency of Evidence on Fraud*

Lennon argues that there was no evidence to establish that Charter was defrauded as required by section 2314. The government presented evidence from which the jury could have concluded that Lennon defrauded Charter of money. First, Lennon extracted ten to twenty cents per barrel from Petrochem that could, and should, have benefited Charter by decreasing the cost of the crude oil. Second, lower costs would have increased profits. Third, the price control regulations would not have prevented this increase in its profits, because most of Charter's refined products were not regulated and, on the regulated products, Charter was never able to obtain the monthly average maximum per barrel profit.

Lennon next argues that there was no evidence of fraud, because the government never presented evidence that Charter suffered detriment in the amount of $5,000 or more for each count. Section 2314, however, requires proof only that the property taken by fraud and transported in interstate commerce have a value of $5,000 or more, 18 U.S.C. § 2314 (1982); *United States v. Freeman*, 619 F.2d 1112, 1118 (5th Cir. 1980), *cert. denied*,

450 U.S. 910, 101 S.Ct. 1348, 67 L.Ed.2d 334 (1981), and that the defrauded party suffer some tangible detriment of value, *United States v. Smith,* 686 F.2d 234, 239-40 (5th Cir. 1982). Section 2314 does not require the defrauded party to suffer detriment in the amount of $5,000 or more.[2] The government carried its burden by presenting evidence from which the jury could have found that Charter did suffer *some* indeterminate detriment for each kickback check and that the kickback payments to Lennon exceeded $5,000.

5. *Transportation of the Fraudulently Obtained Property*

Another issue raised by this case is whether section 2314 requires that all the property transported in interstate commerce be taken by fraud or merely that, of the transported property, at least $5,000 be obtained by fraud.

Here, the government presented evidence establishing that sums in the millions of dollars were transported in interstate commerce only part of which was obtained by fraud. For section 2314 to apply, property transported in interstate commerce having a value of $5,000 must have been obtained by fraud; this does not mean that all the property transported in interstate commerce have been obtained by fraud. See 18 U.S.C. § 2314 (1982); *United States v. Freeman,* 619 F.2d 1112, 1118 (5th Cir. 1980), *cert. denied,* 450 U.S. 910, 101 S.Ct. 1348, 67 L.Ed.2d 334 (1981). Therefore, the government met its burden.

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2. Ordinarily, the amount of the detriment suffered by the defrauded party will in fact be equal to the value of the transported property. Here, however, because it is impossible to prove what Charter would have done had it known of the kickback scheme, the amount of Charter's detriment is not necessarily the amount of the kickback transported in interstate commerce.

6. *Defective Indictment*

Lennon urges that the indictment was defective, because it alleged that "certain proceeds" were taken by fraud and did not allege that the proceeds exceeded $5,000 as required by section 2314. An indictment is sufficient if "it, first, contains the elements of the offense charged and fairly informs a defendant of the charge against which he must defend, and, second, enables him to plead an acquittal or conviction in bar of future prosecutions for the same offense." *Hamling v. United States,* 418 U.S. 87, 117, 94 S.Ct. 2887, 2907, 41 L.Ed.2d 590 (1974). Furthermore, an indictment's validity is ascertained from a reading of it as a whole and is determined by practical, not technical, considerations. *United States v. Willis,* 583 F.2d 203, 207 (5th Cir. 1978).

Here, the indictment is sufficient under the above standard. First, each count of the indictment alleges that Lennon's purpose was to defraud Charter of money in excess of $5,000 and that "certain proceeds" were taken by fraud. If read as a whole and in a practical manner, the indictment alleged all the elements of the crime and fairly apprised Lennon of the charge against him.

7. *Jury Instruction on Elements of Section 2314*

The jury instruction on the elements of section 2314 stated:

> Therefore, there are three essential elements which must be proved beyond a reasonable doubt in order to establish the offense proscribed by the law as applicable to this case:
>
> First: that the defendant willfully transported or caused to be transported, in interstate commerce, checks as described in the indictment;

> Second: that such checks had a value in excess of $5,000; and
>
> Third: that at the time of the transportation the defendant knew the checks were obtained or taken by fraud.

Lennon contends that the indictment materially differed from the trial court's instructions to the jury and that the instructions permitted the jury to convict upon findings shy of what section 2314 requires. Because we agree with Lennon on the latter contention, we need not discuss the former one.

Lennon objected to the instruction on the elements of section 2314 at trial, arguing that the instruction given would allow the jury to convict if it found merely that the checks from Charter to Petrochem exceeded $5,000. Lennon specifically requested that the jury instructions include words to the effect that the portion of such checks taken by fraud must have exceeded $5,000. The government disagreed and insisted that the instruction was correct. According to the government, the whole check from Charter to Petrochem was otained by fraud, because embedded in those checks were kickbacks obtained by fraud. Furthermore, the government argued that there was no problem with the instruction factually, because all of the kickbacks exceeded $5,000. We disagree with the government.

Under the above instruction, the jury could have convicted Lennon by finding that the checks from Charter to Petrochem exceeded $5,000 and that any part of the checks was obtained by fraud. This is significant because of the defendant's evidence that Harrigan arranged the payments and that lesser amounts, if any, were taken

by Lennon. The jury could have found that the checks from Charter to Petrochem exceeded $5,000, that most of the moneys that the government characterized as kickbacks were actually proper commissions paid to Harrigan, and that some amount out of each larger check, possibly less than $5,000, was obtained by fraud.

Section 2314 clearly requires that the fraudulently obtained property transported in interstate commerce exceed $5,000. 18 U.S.C. § 2319 (1982); *United States v. Freeman,* 619 F.2d 1112, 1118 (5th Cir. 1980), *cert. denied,* 450 U.S. 910, 101 S.Ct. 1348, 67 L.Ed.2d 334 (1981). The jury instruction erroneously permitted the jury to find that Lennon violated section 2314 by causing fraudulently obtained property having a value of less than $5,000.

Lennon's conviction is REVERSED and REMANDED.

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No. 84-1448

In the Supreme Court of the United States

OCTOBER TERM, 1984

JOSEPH R. LENNON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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4 pp

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the court of appeals erred in rejecting his claim that proof of knowledge or reasonable foreseeability that securities obtained by fraud will be transported in interstate commerce is required for a conviction of interstate transportation of stolen property, in violation of 18 U.S.C. 2314.

Following a jury trial in the United States District Court for the Southern District of Texas, petitioner was convicted on eight counts of causing the interstate transportation of checks obtained by fraud, in violation of 18 U.S.C. 2314. He was sentenced to a four-year term of imprisonment on count one and to a consecutive five-year term of probation and a cumulative fine of $70,000 on the remaining counts. On appeal, petitioner contended, inter alia, that the trial court committed various errors in instructing the jury. The court of appeals reversed petitioner's convictions because it

concluded that the trial court's instruction concerning the $5,000 minimum jurisdictional amount under Section 2314 was erroneous (Pet. App. A12-A14).[1] The court of appeals rejected petitioner's other claims, including his contention that the trial court erred in instructing the jury that it was not required to find knowledge or reasonable foreseeability by petitioner of the interstate transportation of the checks he obtained by fraud (*id.* at A5-A7).

Petitioner here renews his contention that knowledge or reasonable foreseeability of interstate transportation of a security obtained by fraud is required under Section 2314. Pet. 10-17. Whatever the merits of petitioner's contention, they are not now ripe for review by this Court.[2] The court of appeals has reversed petitioner's conviction on other grounds. Petitioner is now subject to a retrial and is therefore in substantially the same position as any other defendant facing trial. While the trial court presumably will give those instructions approved by the court of appeals at retrial, the absence of the instruction rejected by the court below might result in a different verdict. If petitioner is acquitted on the merits following retrial, his present contention will be moot. If, on the other hand, petitioner is again convicted and his conviction is affirmed on appeal, he will then be able to present his contention to this Court, together with any other claims he may have, in a petition for a writ of certiorari seeking review of a final judgment of conviction. Accordingly, review by this Court of the court of appeals' decision would be premature at this time.[3]

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[1]The court of appeals' opinion replaced an earlier opinion rendered by the same panel (Pet. App. B1-B13).

[2]It is now more than 26 months since the return of the indictment. Further review at this time would result in additional delay in the retrial of the charges against petitioner.

[3]Because this case is interlocutory, we are not responding on the merits to the question presented by the petition. We will file a response on the merits if the Court requests.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

APRIL 1985